No. 2734

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GIDEON M. FREEMAN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

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BRIEF FOR DEFENDANT IN ERROR.

I.

The indictment in the above-entitled case, which is identical with that filed in *United States* vs. *Oesting,* was held by this honorable court to be legally sufficient. See *Oesting* vs. *U. S.* 234 Fed., 304.

II.

That the letters set out in the indictment, the mailing of which is charged therein to be in violation of section 215 of the Criminal Code of the United States, were mailed in response to "decoy" letters sent out by Post Office Inspectors, is no defense to the charge set forth in the indictment.

This has been passed upon by the Supreme Court of the United States, and the language of Mr. Justice Brewer, in *Grimm* vs. *U. S.,* 156 U. S. 604, 311; 39 Law. Ed. 550, is peculiarly applicable to this case. He said:

> "It does not appear that it was the purpose of the Post Office inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business. The mere facts that the letters were written under an assumed name, and that he was a government official—a detective he may be called—do not of themselves constitute a defense to a crime actually committed. The official, suspecting the defendant was engaged in a business offensive to good morals, sought information directly from him, and the defendant, responding thereto, violated a law of the United States by using the mails to convey such information, and he cannot plead in defense that he would not have violated the law if the inquiry had not been made of him by such government official."

In *Goode* v. *U. S.,* 159 U. S., 663, 40 Law. Ed. 297, Mr. Justice Brown said:

> "That the fact that the letter was a decoy is no defense is too well settled by the modern authorities to be now open to contention. (Citing authorities). Indeed, this Court held, in the last term, in *Grimm* vs. *U. S.,* that the fact that certain prohibited pictures and prints were drawn out of the defendant by a decoy letter written by a government detective was no de-

fense to an indictment for mailing such prohibited publications."

Also see:

Montgomery v. *U. S.* 162 U. S., 410; 40 Law. Ed. 1020.

Rosen v. *U. S.* 161 U. S. 29; 40 Law. Ed. 606.

Hall v. *U. S.* 168 U. S. 632; 42 Law. Ed. 607.

III.

It is not true as alleged by counsel for plaintiff in error, that there is no evidence in the record to prove that Dr. Freeman or any one else ever placed or caused to be placed or published in any newspapers or in any letters or booklets or other prints, advertisements of any kind or character whatever wherein it was set forth in substance or effect or at all any one or more of the things, pretenses, representations, promises or statements as charged in the indictment.

The indictment charges that defendant's scheme was (Tr. p. 3) that he should place or cause to be placed, advertisements in certain newspapers of general circulation published within the United States *or* in letters, booklets, or other prints, wherein it should be set forth in substance or effect that the said Dr. Jordan was a physician practicing in * * * San Francisco * * * and specially qualified to treat diseases of men, that is to say, among other diseases, syphilis, gonorrhea, and

diseases and affections arising therefrom, lost vitality, bladder, kidney, prostatic and urinary diseases, and had cured numerous persons afflicted with said diseases.

While it is our contention that evidence of such advertisements by either newspapers, letters, booklets, or prints would be sufficient to sustain the indictment, there is no lack of testimony that all of the methods of advertising were in fact used.

G. A. Leonard, called for the Government, testified (Tr. p. 6) that he had seen "Dr. Jordan's advertisement" such as were referred to in the letter signed "John Bammer", and such as were shown to him by counsel for the Government. James W. Woltz, also called for the Government, identified newspaper advertisements taken from the San Francisco Examiner of March 17th, 1912 (Tr. p. 106), and these same advertisements constituted a part of government's exhibit "C" for identification and were admitted in evidence as part of Government's Exhibit No. 3. The said advertisements both in substance and effect set forth the things, pretenses, representations, promises, and statements charged in the indictment. And, furthermore, it appears in the testimony of defendant Freeman himself (Tr. p. 267) that the concern was advertising and that he knew it.

That there was advertising of the kind alleged in letters, fully appears from the numerous letters and symptom blanks offered in evidence, many of which

were read into the record and appear in the transcript, the letter head used by defendant's concern appearing on page 62 thereof, and on page 267, where knowledge of its use was admitted by the defendant himself. And that they were advertising by means of booklets was fully shown by the introduction in evidence (Government's Ex. No. 5) of "The Philosophy of Marriage" referred to in the newspaper advertisements, in the correspondence (Tr. pp. 63, 72, 74, 93, 107) and admitted by Dr. Freeman to have been published and distributed by the Jordan Museum. (Tr. pp. 253-254, 259-260).

Counsel for plaintiff in error, on page seventeen of their brief, incorrectly assuming that there was a failure of proof as to the allegation of the indictment regarding advertising by means of newspapers of general circulation published within the United States, and arguing from this false premise, contend that such allegations being descriptive of the offense, cannot be rejected as surplusage; we challenge the truth of both premise and conclusion.

In *Hall* v. *U. S.,* 168 U. S. 633 (42 Law. Ed. 607) the Supreme Court held that an immaterial averment that a letter was intended to be delivered by a letter carrier, in an indictment which contained in addition all necessary allegations to charge an offense under the latter part of section 5467 Revised Statutes, need not be proved in order to sustain a conviction. The Court said:

> "It is urged, however, that the conviction cannot be sustained under this third count be-

cause it contains, in addition to the particular allegations necessary to bring the act within the latter part of the section, an allegation that the letter, the contents of which were stolen, was intended to be delivered by a letter carrier. This fact forms no part of the offense mentioned in the second clause of the section in question, and it was therefore unnecessary to allege it. As the third count does contain such an averment, the counsel for the defendant argues that it became necessary to prove the fact thus averred, and, as it was (he argued) unproved, the defendant should have been acquitted by direction of the court. The result of such a holding would be to say that where an indictment contained all the necessary averments to constitute an offense created by the statute, if any averment wholly unnecessary and entirely immaterial be added, the prosecution must fail unless it prove such unnecessary averment, although proving every fact constituting the offense provided by the statute. We are of the opinion that it was not incumbent on the prosecution to prove this averment in order to sustain a conviction under this count.

Without this averment the third count contains every fact necessary to be proved in order to constitute an offense under the second clause of the statute, and the evidence in the case is sufficient to authorize the defendant's conviction upon that count. The character of the offense, as provided by statute, is not changed by this unnecessary averment, nor is the sufficiency of the evidence to sustain a conviction under the third count at all impaired if it be assumed that

it did not show that the letter was intended to be delivered by a letter carrier. This is unlike a case where an unnecessary amount of description of an article to be identified by the description is contained in the indictment. Under those circumstances it has been sometimes held that the description must be proved as laid, because it went to the identification of the article described. Nor is it like the case of an indictment for perjury or one for a libel where the sworn statement alleged to be false or the article alleged to be libelous must be proved substantially as averred in the indictment. In such cases the matter set forth constitutes the offense and must be proved accordingly. But here every necessary fact is averred and proof sufficient to sustain a conviction has been given in regard to each fact. Because the pleader unnecessarily made an averment of a totally immaterial fact, the government was not therefore bound to prove it in order to sustain a conviction. For this reason there was no fatal variance between the offense set forth in the indictment and the proof."

IV.

The testimony of the witness Walker was competent first, as showing a similar offense, and second, as showing the nature of the scheme to defraud.

The testimony of Walker shows that he carried on correspondence with Dr. L. J. Jordan through the mails for several months prior to visiting the place in San Francisco. He said: (Tr. p. 130) "I reside in San Jose, Santa Clara County, and have

resided there for about nine years. * * * I have visited the place here in San Francisco known as Jordan's Museum. Prior to visiting that place, I had correspondence with the institution. * * * (Tr. p. 131) I visited the place about eight months after the first correspondence; I doctored with them by *mail* up to that time, for about eight months. * * * I commenced this treatment on the 6th of September, 1912, and quit doctoring there before the holidays of this year, 1914."

Letters received by Walker on the letter-heads of the institution were read in evidence and appear in the Transcript, pp. 134-143. (Government's Ex. No. 8). In the first of these, dated July 6, 1912, it was said: (Tr. p. 13) "I am *mailing* to you by this *mail,* my book 'The Philosophy of Marriage', *under separate cover."* And in the second, dated July 18th, 1912, "Some time since on your request I *mailed* you a copy of my book, 'The Philosophy of Marriage', which I trust you have received and read with care."

The record fails to show any objection to the introduction of the above correspondence on the ground that it was not carried on through the post office, and we submit that even if such objection had been made, ample evidence appears that the letters and the book were sent to Walker at San Jose, through the United States mails.

While it is true that Walker's testimony showed a kind of physical examination of Walker at Jor-

dan's Museum, this examination was not had until some eight months after the beginning of the correspondence, and Walker took medicine for about that period before he visited the place. (Tr. p. 132) The symptoms blank, and the form letters used in his case are identical with those used in the correspondence with Bammer (Tr. p. 63) Caroway, (Tr. p. 94) and Alberts, (Tr. p. 109). He paid his money for treatment before he ever visited the institution, received no benefit, and was told when he came in person, that he would have to take a "different treatment", (Tr. p. 132) and "more expensive medicines" and pay "an extra $100 for treatment." (Tr. p. 133). Twice when he went to the Jordan Museum, he asked for Dr. Jordan and was told to wait a few minutes and he would be in. (Tr. p. 133) Walker paid them from $200 to $280 (Tr. p. 132) for the treatments, and while it may be true, as said by counsel on page 26 of their brief, "that he was actually ill and suffering from his ailments", it does not appear that he was suffering from what they were treating him for, and his testimony as a whole negatives counsel's contention, that the treatment was given in good faith.

Where the question of fraud is involved a large latitude is always given in receiving the facts, and that proof of similar fraudulent acts is generally relevant to show the intent and motive to defraud need not be urged upon this court. And as was said in *Moore* vs. *U. S.,* 150 U. S. 57; 37 Law. Ed. 996:

"Where the question relates to the tendency of certain testimony to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors."

And in *Wood* v. *U. S.* 16 Pet. 342. (10 Law. Ed. 987):

" * * * The next point presented for consideration is, whether there was an error in the admission of the evidence of fraud deducible from the other invoices offered in the case. We are of the opinion that there was none. The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate, or establish his intent, or motive in the particular act, directly in judgment."

Also see:

Thomas v. *U. S.* 156 Fed. 897;

Farmer v. *U. S.* 223 Fed. 903;

U. S. v. *Snyder,* 14 Fed. 554.

In *Brooks* v. *U. S.* 146 Fed. 223, 231, it was held that the admission in evidence of certain letters

other than those counted on in the indictment, purporting to have been written by the Securities company to different persons throughout the country, and relating to transactions of the company with them, was proper. The court said:

> "These letters were written about the time the offenses laid in the indictment were charged to have been committed. The issue was raised concerning the character of defendant's business and the intent with which it was conducted. It was alleged to have been carried on with intent to defraud. The letters in question were admissible as bearing on the intent with which the business was done and the existence of the scheme to defraud as charged."

And that the period of time within which collateral transactions offered to show guilty intent must have occurred, is largely discretionary with the court, is held in

Spurr v. *U. S.* 87 Fed. 701.

V.

The testimony of witness Boerner was competent to show the course of business dealings carried on by the Jordan Museum during the period of his employment there, from May 1909 to October 1910, on the theory that habits and customs once shown to exist are presumed to continue.

Wharton Criminal Evidence, sec. 819;
16 Cyc. 1052;
Lazarus v. *Phelps,* 156 U. S. 202; (39 Law. Ed. 397);
Greenleaf on Evidence, Vol. I, Sec. 41, p. 138.

This presumption of continuance of facts once shown to exist is applicable to the course of business dealings between persons.

Hastings v. *Brooklyn Life Ins. Co.* 138 N. Y., 473; 34 N. E. 289.

VI.

The motions of defendants at the close of Government's case, to strike out all the evidence, and to take the case from the jury, were properly denied. Furthermore, these motions were not thereafter renewed, and by introducing testimony in his own behalf, defendant waived his objections.

Goldman v. *U. S.* 220 Fed. 57

Collins v. *U. S.* 219 Fed. 670

Sandals v. *U. S.* 213 Fed. 573

Gould v. *U. S.* 209 Fed. 730.

In the latter case the court said:

> "It is assigned as error that the evidence was not sufficient to justify the verdict. While this assignment is argued by counsel for both sides, there was no ruling by the trial court upon which such assignment could be based. A motion was made by counsel for defendants at the close of the evidence for the prosecution, for a directed verdict, but it was not renewed at the close of all the evidence, and was therefore waived."

And while in the absence of a motion or request for an instructed verdict after all the evidence has been submitted, an appellate court *may* note a plain error such as the entire absence of evidence, yet it will not pass upon the weight and sufficiency thereof;

> *Wiborg* v. *U. S.* 163 U. S. 632 (41 Law. Ed. 289).

And in *Simpson* v. *U. S.* 184 Fed. 817, 820, the Circuit Court of Appeals for the Eighth Circuit refused to review the sufficiency of the evidence because no request for an instructed verdict was made after all the evidence had been introduced.

We submit that there was no such lack of evidence as would constitute the judgment in this case plainly erroneous.

That the scheme charged in the indictment was devised, and that it was fraudulent, was amply proven, and the jury were justified in inferring guilty knowledge of and participation therein, of defendant, from his long connection (sixteen years) with the institution (Tr. p. 25); the fact that he was a director (Tr. p. 149) and secretary of the corporation, (Tr. p. 174); his frequent visits at the place, (Tr. p. 148); that the license was issued in his name (Tr. p. 150); that he signed checks (Tr. p. 150) in the name "L. J. Jordan"' (Tr. p. 167, 189), and that he signed the minute book of the corporation (Tr. p. 171); that he owned 49,900

shares of stock, (Tr. p. 175), and received one-half the profits (Tr. p. 155); that the stock letters were easy of access (Tr. p. 157) and that they were in use for many years; that defendant had access to the books (Tr. p. 157); that he signed the by-laws, (Tr. p. 180); that he signed the certificate required by the State Board of Medical Examiners, (Tr. p. 188); that a large percentage, perhaps 30% of the business, was mail order business, and the letters sent out usually form letters (Tr. p. 191); the admissions of defendant that he had the book, "The Philosophy of Marriage" reprinted (Tr. p. 254); that he had heard of the form letters (Tr. p. 255), that business was carried on by mail, (Tr. p. 255), that he had seen the letter heads used (Tr. p. 266) and knew that the people working there were busy sending out mail, and that the firm was advertising (Tr. p. 266); and also his statements to the Police Commission, admitted to the State Board of Medical Examiners, that if a patient called asking for Dr. Jordan he would be told, "I am the doctor." (Tr. p. 233.)

VIII.

The penalty imposed by the Court was a fair one, and the demands of justice do not call for a mitigation of same. If Dr. Freeman was guilty at all, and we do not doubt it, he was for many years a participant in the unlawful scheme, and he profited largely thereby, his profits sometimes amounting to as much as $1,000 per month (Tr. p. 155). The sentence of imprisonment—one year in the county

jail—is the same as that imposed upon Oesting, and though the fine imposed upon Freeman was $1,000, while that of Oesting was $500, the testimony shows that Freeman benefitted financially more than did Oesting.

The United States Attorney does not feel justified in consenting to a modification of the sentence imposed by the trial court, and submits that the judgment should be affirmed.

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